

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

PATRICK NAZEMI,

Plaintiff and Appellant,

v.

BERNARD GOODMAN, et al.,

Defendants and Respondents.

B209989

(Los Angeles County
Super. Ct. No. LC075586)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Bert Glennon Jr., Judge. Reversed.

Derek L. Tabone for Plaintiff and Appellant.

Procter, Slaughter & Reagan and Lisa N. Shyer for Defendants and
Respondents.

Plaintiff Patrick Nazemi appeals the trial court's grant of summary judgment in favor of defendants Bernard and Rose Goodman. The trial court granted the motion on the basis that there was no triable issue of material fact regarding Nazemi's claim of vicarious liability for the actions of Jaime Colon, a security guard of Strike Force Protective Services, Inc. (Strike Force). Moreover, the trial court granted summary judgment on Nazemi's claim against the Goodmans for their alleged, independent tortious conduct. For the reasons discussed below, we reverse, finding triable issues of material fact regarding the vicarious liability claim on the theory of agency.

FACTUAL BACKGROUND AND PROCEDURAL SYNOPSIS

I. Background

Patrick Nazemi and the Goodmans are next door neighbors in an exclusive neighborhood in Lake Encino, California. On June 30, 2004, when the Goodmans were out of town, their home was burglarized and vandalized. Shortly thereafter, the Goodmans decided to hire a company to provide security services at night on their property. They contacted their home security company, ADT, and it referred the Goodmans to Strike Force, a company that provides security guard services.

II. Employment of Strike Force

While there is some dispute as to whether the Goodmans or their son, Jeff, made the initial contact with Strike Force, the Goodmans eventually employed Strike Force to guard the Goodman property from 9:00 p.m. to 9:00 a.m. every day. Either the Goodmans or Jeff initially spoke with Jaime Colon, who later became one of the security guards for the Goodman residence. Colon had both supervisory and managerial responsibilities at Strike Force.

During the preliminary conversations with Colon, the Goodmans decided that they wanted a guard, armed with a gun at all times, to “patrol the perimeter of their home.”

If the Goodmans were having guests, either Bernard or Rose would notify the guard. However, if a person arrived on the property unannounced, the Goodmans asked that the security guard notify them, so they could then determine if this guest was permitted to enter onto their property. Moreover, the Goodmans asked that the security guards announce when they arrived to begin their shift and when they departed at the end of their shift.

During the Goodmans' working relationship with Strike Force, Bernard gave Colon a key to a gate to gain access to the entirety of the Goodmans' property. Bernard confirmed that Colon was the only person, other than Bernard himself, who had a key to the property. Upon leaving each day, Colon was to lock the gate.

III. Prior Incidents

Prior to August 24, 2004, Nazemi had, "[a]t least two or three" separate conversations with Bernard regarding the treatment of Nazemi's guests by the Strike Force security guards. In the first of these conversations, Bernard approached Nazemi to complain about guests' cars in Nazemi's driveway as late as 2:00 a.m. Nazemi took that opportunity to tell Bernard that, "his security guards have been harassing my guests and my maid and my fiancée." In his sworn deposition, Nazemi explained that the guards would ask his guests for identification and, in some instances, would ask to look into their cars and into their trunks. At one point, Nazemi also complained to Bernard that the security guards had rifled through his fiancée's personal baggage. Nazemi alleged that on both occasions Bernard assured Nazemi that he would talk to his guards.

IV. The August 24, 2004, Altercation

On August 24, 2004, at approximately 8:00 a.m., Nazemi's fiancée, Deborah Perez, was walking from Nazemi's house towards her car parked in Nazemi's driveway when she was approached by Colon. In her sworn deposition, Perez stated that Colon demanded to know what was in the bags she was placing in her car. Perez told Colon it

was none of his business and retreated back to Nazemi's house to retrieve additional items. While Perez was inside the house, Colon entered Perez's unlocked car and began to search through its contents.

Perez, again, went back into Nazemi's house and told him what Colon had done. Nazemi became angry and went outside, "to find out what's going on" and did not return for 45-60 minutes.

In his pajamas, Nazemi walked outside his house to speak with Colon on his driveway. Within a minute of approaching Colon, Colon struck Nazemi in the face with his right fist. Nazemi fell backward towards his property, losing consciousness. The next thing Nazemi recalled was Colon kicking and dragging him onto the Goodmans' driveway; one of his hands in a handcuff. Nazemi then repeatedly called out to Bernard, "Bernie." At some point, Nazemi believed he was struck with a nightstick. The Goodmans, alongside their hired general contractor, Steve Stone, witnessed this assault from a large window at the front of their home and heard Nazemi's calls. Nazemi, still on the driveway ground with Colon, then saw Bernard standing in his front doorway. Nazemi saw a gun, held at thigh level in Bernard's hand. Bernard raised the gun slightly in the general direction of both Nazemi and Colon. At one point while Bernard was outside, Nazemi shouted, "Get this guy off of me." Bernard remained at the doorway, "He looked, grinned, and went back in."

Colon placed both of Nazemi's hands in handcuffs. Nazemi heard Colon call for backup and another Strike Force guard, Mr. Tidwell, responded. When Tidwell arrived, the two men dragged Nazemi from the Goodmans' driveway to the curb on the opposite side of the driveway, away from Nazemi's home. Tidwell took Nazemi's left arm and Colon took Nazemi by his right arm.

Shortly after, the police intervened. The police asked Colon to remove the handcuffs. When Colon ignored the request, the police used their own keys to open the handcuffs. Later, an ambulance arrived and Nazemi was placed on a stretcher to receive medical attention.

V. Procedural History

Nazemi filed a verified complaint for damages against the Goodmans and unnamed Does on August 23, 2006.¹ He filed a first amended complaint, alleging seven causes of action: (1) battery; (2) kidnapping; (3) false imprisonment; (4) intentional infliction of emotional distress; (5) negligence; (6) negligent supervision; and (7) negligent hiring. Each cause of action alleges that the Goodmans were vicariously liable for the actions of Colon. The Goodmans filed their answer. Additionally, the Goodmans filed a cross-complaint against Strike Force for indemnity and contribution.

The Goodmans then filed a motion for summary judgment. Nazemi opposed the motion.²

At the hearing, the trial court granted the Goodmans' motion both for vicarious liability of the actions of the Strike Force security guards and their own alleged tortious conduct. The trial court noted that there was insufficient evidence that Colon was the Goodmans' employee or agent. Moreover, the court observed Bernard did not have a duty to stop Colon from using force against Nazemi.

Nazemi filed a timely notice of appeal from the judgment subsequently entered by the court.

DISCUSSION

I. Summary Judgment

A. Standard of Review

In the instance of a summary judgment motion, the moving party bears the burden of demonstrating that there is no triable issue of material fact upon which a jury could find in favor of the nonmoving party. (*Aguilar v. Atlantic Richfield Co.* (2001) 25

¹ Nazemi filed Doe amendments naming Colon and Strike Force as defendants.

² Nazemi's points and authorities are not part of the record on appeal.

Cal.4th 826, 850.) “Once the [movant] has met that burden, the burden shifts to the [nonmoving party] to show that a triable issue of one or more material facts exists as to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(1); see *Aguilar, supra*, 25 Cal.4th at p. 850.) If, after examining all papers, the court determines there is no triable issue of material fact, the court should grant the motion for summary judgment. (*Ibid.*) Where the trial court has granted the motion for summary judgment, this court reviews that determination de novo, “considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.” (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476.) However, “[i]n performing our de novo review, we must review the evidence in a light favorable to plaintiff as the losing party, liberally construing [his] evidentiary submission . . . and resolving any evidentiary doubts or ambiguities in plaintiff’s favor.” (Citation omitted.) (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768.)

B. Agency Allegation

The Goodmans moved for summary judgment on the grounds that because they were not vicariously liable for the conduct of the security guards, there was no triable issue of material fact with respect to Nazemi’s claims against them. The trial court noted there was no evidence Jaime Colon was an employee/agent of the Goodmans, and therefore, the Goodmans could not be held vicariously liable for the actions of Colon. On appeal, Nazemi contends that the security guards employed by Strike Force acted as agents or subagents under the control of the Goodmans.

The Restatement Second of Agency, section 1, page 7, defines the principal/agency relationship as: “(1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. [¶] (2) The one for whom action is to be taken is the principal. [¶] (3) The one who is to act is the agent.”

Moreover, “A subagent is a person appointed by an agent empowered to do so, to perform functions undertaken by the agent for the principal, but for whose conduct the agent agrees with the principal to be primarily responsible.” (Rest. 2d Agency, § 5, p. 21.)

On the contrary, “An independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.” (Rest. 2d Agency, § 2, p. 12; see also *Sills v. Siller* (1963) 218 Cal.App.2d 735, 739.)

“An independent contractor is one who, in rendering services, exercises an independent employment, and represents the employer only as to the results of his work and not as to the means whereby it is to be accomplished.” (*George v. Chaplin* (1929) 99 Cal.App. 709, 712 [where there was evidence that the employer, a car dealership, had the right to control the mode and manner of the work done by an automobile salesman when he injured customers in a car demonstration, meaning the salesman was not an independent contractor].)

“In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists.” (*Sills, supra*, 218 Cal.App.2d at p. 740.)

Whether an agency exists is a question of fact. (*Bergtholdt v. Porter Bros. Co.* (1896) 114 Cal. 681, 688; see also *MacDonnell v. California Lands, Inc.* (1967) 15 Cal.2d 344, 347.) The court should consider many factors in making its determination: (a) the extent of control which, by the agreement, the principal may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist

without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; and (j) whether the principal is or is not in business. (Rest. 2d Agency, § 220, p. 485.)

As an illustration, where mill operators did not control logger's work methods but only furnished tractor and paid for timber cut, logger was independent contractor, whose knowledge of title status of timber land could not be imputed to mill operators. (*Sills v. Siller, supra*, 218 Cal.App.2d at pp. 740-741.) In fact, "there was no evidence of any control in the method of doing the work." (*Id.*, at p. 741.)

Contrarily, in *Cal. Emp. Com. v. L. A. etc. News Corp.* (1944) 24 Cal. 2d 421, 424-425, where a local publication hired 1,000 boys under the age of 18, without a written contract, to distribute its weekly publication and dictated the hours of distribution, the routes each boy would follow and the manner by which they traveled, the court found that the young boys were not independent contractors and a relationship of agency did exist.

1. The Goodmans' Showing

The Goodmans' summary judgment motion was largely based on the premise that there was no triable issue of material fact with respect to the fact that Strike Force security guards were the agents or employees of either Bernard or Rose Goodman. At the hearing, the Goodmans reiterated there was no employer-employee relationship as they did not control the security guards.

2. Triable Issue

At the trial court hearing, Nazemi argued that there were material factual disputes within the record to overcome the summary judgment motion. Having reviewed the

evidence and because of the fact driven nature of agency, we agree. Where a homeowner contracts with an independent security company and offers to speak to the company's agents in an effort to modify the work performed, there is a triable issue of material fact as to whether that homeowner has the right or ability to control the methods used by the company's security guards.

In the instant case, Bernard offered to speak with his guards when he learned of their conduct in harassing his neighbor Nazemi and Nazemi's guests. Bernard's offer to speak to the guards suggests that perhaps the Goodmans did have control over the security guard's conduct. If such a conversation with the security guards would have impacted the way the Strike Force guards conducted their business on the Goodmans' property, there are reasonable inferences a neutral party could make as to whether an agency existed.

Moreover, in contracting with Strike Force, the Goodmans had a laundry list of requests. The Goodmans requested that the guards carry a firearm. The Goodmans asked that the guards announce their arrival and departure to the Goodman residence. Additionally, the Goodmans instructed the guards to notify them of any guests arriving on the property. In these instances the Goodmans would then determine whether or not that visitor was permitted on their property, arguably with the security guard serving as an intermediary. Finally, the Goodmans gave Colon, and only Colon, a key to the gate on their property.

It is not the responsibility of this court to determine the outcome on the question of agency. However, when reviewing a successful summary judgment motion, we must determine whether there are material factual disputes in the record that amount to triable issues. In this case we hold that these factual disputes are compelling on the issue of agency such that a fact finder could rule in favor of Nazemi.

One final, unresolved question that leads this court to find a triable question of agency depends on Colon's participation in discussing the terms of the Strike Force agreement and his later employment as an armed security guard on the Goodmans'

property. Although at this time the facts surrounding Colon's initial discussions with the Goodmans and his later involvement on the Goodmans' property are unclear, a reasonable inference could be made that Colon himself secured the Goodmans' employment of Strike Force and later worked under the agreement he negotiated. Given this additional involvement by Colon, in addition to considering the other evidence before this court as a whole, there are some unresolved triable issues of material fact that require answers in order to find a principal/agency/subagency relationship, or the lack thereof.

Of course, there are facts that lend themselves to the opposite conclusion. First, the Goodmans' requirements that the security guards worked from 9:00 p.m. through 9:00 a.m. and must be armed with a gun were not unusual requests and, in fact, were regular requests by others that hired Strike Force. Moreover, the Goodmans did not pay the Strike Force guards individually, but instead sent a check to the Strike Force offices. Nevertheless, these undisputed facts simply do not outweigh those that weigh in favor of the existence of triable issues of material fact.

As we reverse the summary judgment, we need not address Nazemi's contention that the court abused its discretion when it failed to tax certain costs.

DISPOSITION

The judgment is reversed. Nazemi to recover costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.